UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CINDY CHRISTOPOULOS,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 94-74-P-C***
	)	
DONNA E. SHALALA,	***)***	
Secretary of Health	***)***	
and Human Services,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Supplemental Security Income ("SSI") appeal raises the single issue whether there is substantial evidence in the record to support the Secretary's finding that the plaintiff's impairments do not meet or equal any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"). The plaintiff contends that the evidence does not support the finding that her mental impairments do not meet the "B" criteria of Listings 12.04 (affective disorders), 12.06 (anxiety-related disorders) and 12.08 (personality disorders).[2]

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[1] This action is properly brought under 42 U.S.C. § 1383(c)(3). The Secretary has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on February 28, 1995 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, cause authority and page references to the administrative record.

[2] The Listing of Impairments, Appendix 1 to Subpart B , 20 C.F.R. § 404, describes physical and mental impairments in terms of specific medical criteria and functional limitations; if an

(continued...)

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since April 28, 1992, Finding 1, Record p. 18; that she suffers from "a severe affective disorder, anxiety disorder, personality disorder and obesity," but that she does not have an impairment or combination of impairments that is equal to any listed in the Listings, Finding 2, Record p. 18; she has no past relevant work experience, Finding 5, Record p. 18; that she had a high school education and vocational training in secretarial studies, Finding 8, Record p. 19; that her residual functional capacity for the full range of light work is reduced by her inability to stand or walk for prolonged periods, Finding 6; Record p. 19; that, in light of these findings, there exists a significant number of jobs in the national economy the plaintiff could perform, including those of cashier, sales clerk, ticket taker and seller, and parking lot attendant, Finding 10, Record p. 19; and that, therefore, the plaintiff was not disabled, Finding 11, Record p. 19. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Secretary, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F. 2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F. 2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions

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[2](...continued)
impairment meets the listing requirements, then it is considered to be disabling regardless of age, education or work experience. 20 C.F.R. §§ 416.920(d), 416.925(c) and (d).

drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs*., 647 F.2d 218, 222 (1st Cir. 1981).

In her testimony, the plaintiff complained of depression, stomach problems, alcoholism, and pain in both her back and her knees. Record p. 37. She testified that she attempted suicide in 1987, *id*. p. 44, and was hospitalized for a depression-related drug overdose in 1988, *id*., p. 45. She stated that she sometimes does not leave her apartment for weeks at a time, that she takes medication to treat her depression, and that when she is not taking medication she sometimes hears voices that urge her to take her life. *Id.*, pp. 49-50, 52. Psychologist Roger Ginn evaluated the plaintiff in August 1992 and found "some clinical depression which is in line with her description of her current emotional state." *Id*., p. 194. He also found "evidence of significant personality dysfunction . . . a good deal of social interpersonal anxiety and . . . extremely low self-esteem." *Id*. He made a diagnosis of "dysthymic disorder [and] mixed personality disorder with avoidant and self-defeating features." *Id*. Robert A. Haines, M.D. met with the plaintiff on September 2, 1992 and noted that she reported experiencing "none of her depressive symptoms." *Id*., p. 198.

The plaintiff's work history is very limited. She has not held a job since 1987, when psychological problems forced her to leave her position at a shoe factory. *Id*., pp. 29, 38, 44-45. In 1988 she enrolled in a Job Corps program, but failed to complete it, again because of psychological problems. *Id*., p. 40. In 1989 and 1990 she successfully completed a secretarial training program at the University of Maine at Farmington, testifying that the program was a "pretty good" experience for her because of the supervision she received. *Id*. p. 42-43.

Where a mental impairment is asserted, an administrative law judge must assess its severity following the special procedure outlined in the regulations. 20 C.F.R. § 416.920a(a). These steps

are reflected in the "Psychiatric Review Technique Form" that must be completed by the administrative law judge and appended to the hearing-level decision.[3] *See* 20 C.F.R. § 416.920a(b)(1). The administrative law judge must indicate whether certain medical findings that have been found especially relevant to the ability to work are present or absent. 20 C.F.R. § 416.920a(b)(2). These medical findings are summarized in the "Medical Summary" portion of the Psychiatric Review Technique Form and mirror the "A" criteria of the Listings for mental impairments. Then, functional loss must be rated in four areas considered essential to the ability to work, i.e., activities of daily living, social functioning, concentration and persistence or pace, and deterioration or decompensation in work or work-like settings. 20 C.F.R. § 416.920a(b)(3). The "Rating of Impairment Severity" portion of the Psychiatric Review Technique Form reflects the "B" criteria of the Listings. The ratings determine whether a mental impairment is severe.[4] If severe, the characteristics of the impairment are compared to the "A" and "B" criteria of the Listings (or the "A"

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[3] The Psychiatric Review Technique Form may be completed at the hearing level by an administrative law judge without the assistance of a medical advisor. 20 C.F.R. § 416.920a(d).

[4] Specifically, the B criteria are:

1. Marked restriction of activities of daily living; or

2. Marked difficulties in maintaining social functioning; or

3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere);

4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).

The Listings at 12.04(B); 12.06(B); 12.08(B). For purposes of the fourth criterion, "repeated" means three or more episodes. *See* 20 C.F.R. § 416.920a(b)(3).

and "C" criteria if applicable). 20 C.F.R. § 416.920a(c)(2). If a severe impairment does not meet or equal one in the Listings, a residual functional capacity assessment must be done. 20 C.F.R. § 416.920a(c)(3). In making these determinations, an administrative law judge may seek and consider the opinions of a medical advisor. 20 C.F.R. § 416.927(a)(2); *see Richardson*, 402 U.S. at 408 (approving use of medical advisor "for explanation of medical problems in terms understandable to the layman-[administrative law judge]").

At a hearing conducted on February 18, 1993, the administrative law judge completed the Psychiatric Review Technique Form with the assistance of a medical advisor, Dr. Carlyle Voss, a psychiatrist. *See* Record, pp. 20-23, 55-62. Considering the "A" criteria, the administrative law judge indicated the presence of an affective disorder within the scope of Rule 12.04 of the Listings, the presence of an anxiety-related disorder within the scope of Rule 12.06 of the Listings, and the presence of a personality disorder within the scope of Rule 12.08 of the Listings. *Id*., pp. 20-22. As to the "B" criteria, however, the judge found none of the functional limitations at the level required to meet any of these listings. *Id*., pp. 22-23. He also did not find the functional limitation set forth in the "C" criterion for Rule 12.06. *Id*., p.23.

The plaintiff contends that the administrative law judge's findings as to the "B" criteria are not supported by substantial evidence. According to the plaintiff, the administrative law judge ignored testimony from the medical advisor that her functional limitations meet two of the criteria, which would meet the requirements of Listings 12.04 and 12.06. In particular, she points to the medical advisor's testimony concerning the third and fourth "B" criteria, involving deficiencies in concentration, persistence or pace, and deterioration or decompensation in work or work-like settings. On direct examination, the medical advisor stated that the plaintiff's level of functioning

did not meet the third criteria, which requires "frequent failure to complete tasks in a timely manner (in work settings or elsewhere)," or the fourth criteria, which requires "repeated" episodes. *Id*., p. 57-58. However, on cross examination the medical advisor testified that the plaintiff's deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner are "probably frequent in a work setting." *Id*., p. 60. Concerning the episodes of deterioration or decompensation, he noted the evidence in the record of three such episodes and concluded that this meets the definition of "repeated" episodes. *Id*., pp. 61-62.

The Secretary's position is that the administrative law judge properly rejected this testimony from the medical advisor because it was based on an erroneous assumption concerning the evidence of the plaintiff's work history. I agree. The actual testimony makes this clear:

> [Counsel for plaintiff]: . . . I hate to push you on this, and ultimately you can answer whatever you wish. But if you had to choose between often and frequent in terms of a work related setting under [B criterion] number 3 --
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> [Medical advisor]: I would say it's probably frequent in a work setting.
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> * * *
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> [Counsel]: I guess I was also wondering if maybe, if the Job Corp experience or the, the training at UFM [sic], University of Maine in Farmington, made any difference there, since they seem to be somewhat work related.
>
> [Medical advisor]: Again, I just say that what she described I would accept as being accurate.

Id., pp. 60-61. The medical advisor goes on to suggest that the plaintiff's psychological condition and ability to adapt to work situations is probably improved because she is no longer abusing alcohol. *Id*., p. 61. But counsel for the plaintiff then continues to press the medical advisor for his views on the B criteria:

> [Counsel]: I think the one thing again I was unclear is number 4, on the B criteria, episodes of deterioration and decompensation, et cetera. Did you, did you actually --
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> [Medical advisor]: Well, I think if you accept those three episodes, that there were -- there was withdrawal back at that time from those scenics, and the work, the job in the factory and dependent on how you characterize the other two, the Job Corp and the others being work-like settings, she did withdraw from those.
>
> [Counsel]: Okay. Would you say that's once or twice or repeated?
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> [Medical advisor]: Well, it would be three times by definition.

Id., pp. 61-62.

As noted *supra*, the only record evidence concerning the plaintiff's experience at the University of Maine at Farmington suggests that her secretarial training course there was a success. While I have no doubt that this program qualifies as a "work or work-like setting[]" as required by the fourth B criterion, it is apparent that the medical advisor was mistaken in his assumption that there is evidence the plaintiff experienced "deterioration or decompensation" while in this program. Moreover, the record includes a Psychiatric Review Technique Form completed by a medical consultant as part of the plaintiff's assessment at the state agency level. *See id.*, pp. 116-23. According to this evaluation, conducted in August 1992, the plaintiff did not meet any of the four B criteria and, in fact, *never* experienced any episodes of deterioration or decompensation in work or work-like settings. *See id*., p. 123. While the findings of non-testifying, non-examining physicians do not necessarily constitute substantial evidence in themselves, and their significance will vary with the circumstances, *see Rose v. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994) (citations omitted), here the written findings simply corroborate that the medical advisor made a mistaken assumption in his testimony. The claimant has the burden at Step Three of the Secretary's evaluative process, 20 C.F.R. § 416.920(d); *Dudley v. Secretary of Health & Human Servs*., 816 F.2d 792, 793

(1st Cir. 1987), and has adduced no evidence from which the Secretary could conclude that the plaintiff meets the fourth B criterion.[5] There is substantial evidence in the record to support the administrative law judge's determination that the plaintiff's mental impairments do not meet or equal any of the Listings.

Accordingly, I recommend that the Secretary's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 13th day of March, 1995.

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David M. Cohen
United States Magistrate Judge

[5] The same cannot necessarily be said about the third B criterion, concerning "deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner (in work settings or elsewhere)." The medical advisor's testimony, that the plaintiff's experience of such symptoms is "probably frequent in a work setting," does not appear to have been qualified by specific reference to and reliance on the plaintiff's record at the University of Maine at Farmington. *See* Record p. 60. However, I need not determine whether substantial evidence in the record supports the determination as to the third criterion. To meet or equal Listings 12.04 and 12.06 requires a finding at the required level of severity of at least two of the B criteria; Listing 12.08 requires such a finding of three of them. Since the plaintiff does not contend that she meets either of the first two B criteria, the finding that she does not meet the fourth rules out the possibility of meeting any of these Listings.